SUPREME COURT, U. S.

APR 24 1969

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IN THE

Supreme Court of the United States

October Term, 1968

No. 1306

DOSSIE WALLS,

Petitioner,

v.

VINCENT R. MANCUSI, WARDEN,
ATTICA STATE PRISON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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April 24, 1969

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VINCENT R. MANCUSI, WARDEN,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Dossie Walls prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals entered in the above-entitled case on January 24, 1969, which affirmed the District Court's dismissal of petitioner's application for release from state prison upon habeas corpus.

Opinions Below

The opinion of the Court of Appeals is reported at 406 F.2d 505 (1969). It is printed as Appendix A hereto.* The order of the District Court is not reported. It is printed as Appendix B hereto.

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* References to appendices will be in the form "(App. A, p. ——)".

Jurisdiction

The judgment of the Court of Appeals was rendered on January 24, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

The petition presents significant issues under the Fifth Amendment:

(1) Was petitioner denied unimpeded exercise of his right to remain silent at his trial, when the trial judge stated to the jury "Maybe the defendant will explain" the source of certain money found on his person?

(2) In holding that the comment on petitioner's failure to testify was not prejudicial, could the Court of Appeals properly base its action on its conclusion that it was "highly unlikely that any substantial rights of the relator were affected", without finding that it had been proven beyond a reasonable doubt that the comment did not contribute to petitioner's conviction?

Constitutional Provision and Statute Involved

The Fifth Amendment to the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall

be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." (U.S. Const., Amend. 5)

Section 2111 of the Judicial Code provides:

§ 2111. Harmless error:

"On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." (28 U.S.C., 1964 ed., Sec. 2111)

Statement of the Case

On March 16, 1961, after a jury trial, petitioner was convicted in Kings County Court, New York, of robbery, assault, and grand larceny under an indictment alleging in substance that petitioner and a companion forcibly took $104 from a truck driver, who was unhurt, on August 12, 1960. On April 27, 1961, petitioner was adjudicated to be a second felony offender by the state court trial judge and sentenced to a term of fifteen to twenty years imprisonment. An appeal was taken to the Appellate Division of New York Supreme Court, Second Department, where petitioner's conviction was affirmed without opinion.

Thereafter, having exhausted his available remedies in the state courts, 28 U.S.C. § 2254, petitioner applied to the United States District Court of the Western District of New York for a writ of habeas corpus to procure his release from Attica State Prison. The jurisdiction of the District Court was invoked under 28 U.S.C. § 2241, petitioner claiming violations of federally guaranteed consti-

tutional rights in the state court trial. The District Court, while denying petitioner's application, granted a certificate of probable cause for appeal.

Before the District Court petitioner had argued, *inter alia*, that the state court trial judge had improperly interfered with petitioner's exercise of his constitutional right under the Fifth Amendment to remain silent. The District Court had expressed the view that this "undoubtedly is a close question" (App. B, p. 11a), and it was accordingly pressed before the Court of Appeals.

At petitioner's trial the sum of $104 was introduced in evidence as money found on his person at the time of his arrest. This was the exact amount which the complainant claimed had been taken from him. The defense objected to the introduction of this evidence on common-law grounds. The court overruled the objection, commenting:

> ". . . I am allowing this money in evidence at this time as money found on the person of the defendant. *Maybe the defendant will explain.*" (Tr. 78)* (Emphasis supplied)

Petitioner, who had a criminal record, did not take the stand. A co-defendant did take the stand and asserted an alibi for himself and petitioner. The alibi, however, evidently was not believed by the jury, which found both defendants guilty.

The Court of Appeals for the Second Circuit, while noting that it strongly disapproved of the trial judge's comment (App. A, p. 7a), concluded that it was "highly unlikely that any substantial rights of relator were affected by the judge's remark." (App. A, p. 8a)

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* The stenographic transcript of the trial is cited in the form "(Tr. ——)".

REASONS FOR GRANTING THE WRIT

I.

This Case Involves the Importance to Be Attached to a Trial Judge's Suggestion to a Jury That a Criminal Defendant Can Be Expected to Testify With Respect to Incriminating Evidence.

In *Griffin* v. *California,* 380 U.S. 609 (1965), it was held that comment in a state proceeding on an accused's failure to testify violated the self-incrimination clause of the Fifth Amendment. The following year this Court made it clear that, in spite of *Griffin's* prospective application, it was to apply to all convictions which had not become final on the date of the *Griffin* judgment. *O'Connor* v. *Ohio,* 385 U.S. 92 (1966). Petitioner clearly falls within that category since his conviction was on appeal to the Appellate Division of the New York State Supreme Court, Second Department, when the decision in *Griffin* was rendered.

In *Griffin* this Court decided that an accused's privilege of refusing to testify in a state court proceeding may not be cut down by making its assertion costly. Specifically, it found that comment on a failure to testify as to facts peculiarly within the accused's knowledge solemnizes that silence into evidence against him. In the instant case, the only tangible piece of evidence connecting the petitioner with the alleged crime was the $104 taken from his person. In this context, the trial judge's remark that "Maybe the defendant will explain" could not have escaped the jury when they weighed the significance of the evidence.

Because of the timing of the judge's comment, it did not have to be repeated to register an impact on the jury.

The physical exhibit before the jury throughout the trial served as a constant reminder that the judge had suggested that the petitioner "explain" matters to the jury. Thus, as in *Griffin,* the practical effect of the judge's remark was to call to the jury's attention petitioner's failure to testify. Although, unlike *Griffin,* the remark was made before the defendant's opportunity to testify arose, the result was the same. Petitioner was forced to pay a penalty for exercising his constitutional right to remain silent.

The penalty was not erased by subsequent events occurring at the trial. Although the trial judge properly charged the jury that petitioner was not required to testify, that hardly neutralizes the impact of a specific comment to a lay jury. Although the Court of Appeals attached significance to the charge (App. A, p. 8a), similar language can be found in the trial judge's charge in almost every decision of this Court finding a violation of an accused's right to remain silent. See *Griffin* v. *California, supra; Chapman* v. *California,* 386 U.S. 18 (1967); *Fontaine* v. *California,* 390 U.S. 593 (1968). Also, although the Court of Appeals attaches significance to the fact that petitioner's co-defendant testified as to the source of the money found on petitioner (App. A, p. 8a), this fact appears to accentuate rather than dissipate the prejudice caused by the remark. If the judge had not indicated that an explanation was required, both defendants might have remained silent.

The standard against which the prejudice to petitioner is to be tested was laid down by this Court in *Chapman* v. *California, supra.* It was recognized that some constitutional errors may, in the particular setting of the case, be so unimportant and insignificant as to be consistent with the Federal Constitution. However, in fashioning a harm-

less-constitutional-error rule, the Court refused to adopt the language contained in Section 2111 of the Judicial Code and various State harmless-error statutes. Reasoning that those statutes were designed to prevent setting aside a conviction for small errors that had little likelihood of having changed the results of the trial, the Court stated that a different standard was appropriate where constitutional rights were concerned:

> "We prefer the approach of this Court in deciding what was harmless error in our recent case of *Fahy* v. *State of Connecticut*, 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed. 2d 171. There we said: 'The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.' * * * There is little, if any, difference between our statement in *Fahy* v. *State of Connecticut* about 'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction' and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (386 U.S. at 23-24)

II.

This Case Raises the Question Whether the Lower Courts Must Make the Specific Finding Prescribed by This Court in *Chapman*, to the Exclusion of Less Rigorous Findings.

Since this Court's decision in *Chapman*, it has repeatedly emphasized the necessity that a finding be made by the reviewing court that the beneficiary of the constitutional error proved beyond a reasonable doubt that the error did not contribute to the verdict obtained. *Fontaine* v. *California, supra; Anderson* v. *Nelson,* 390 U.S. 523 (1968). The Court's stricter harmless-error standard in cases involving violations of constitutional rights has been applied in numerous decisions in other circuits. See, *e.g., Ford* v. *United States,* 379 F.2d 123, 125 (D.C. Cir. 1967) (" . . . burden is on the Government to show beyond a reasonable doubt that the denial of the defendants' rights is harmless error."); *Bayless* v. *United States,* 381 F.2d 67, 75 (9th Cir. 1967) (" . . . federal constitutional error can be held harmless if the court is able to declare a belief, beyond a reasonable doubt, that it was harmless."); *Pearson* v. *United States,* 389 F.2d 684, 688 (5th Cir. 1968) (" . . . beneficiary of the error must show beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.").

By contrast, the Court of Appeals in this case found only that it was "highly unlikely that any of the substantial rights of the relator were affected by the judge's remark." (App. A, p. 8a) Although citing the *Chapman* decision, the Court of Appeals in fact applied the old federal and state harmless-error rule which was explicitly rejected in *Chapman.*

III.

This Case Raises the Question Whether the Lower Courts May Disregard Violations of Constitutional Rights on the Ground That a Verdict Is Supported by Independent Evidence, or on the Ground That Timely Objection Was Not Made.

In support of its finding, the Court of Appeals also referred to the existence of other evidence presented at the trial (App. A, p. 8a), and to the fact that trial counsel had not made objection to the trial judge's comment. (App. A, p. 8a)

While the presence of untainted evidence sufficient to convict is determinative under the federal and state harmless-error rule which emphasizes "substantial rights", this Court has rejected such a quantitative analysis when applying the *Chapman* standard.

> "And though the case in which this occurred presented a reasonably strong 'circumstantial web of evidence' against petitioners [citation omitted], it was also a case in which, absent the constitutionally forbidden comments, honest, fair-minded jurors might very well have brought in not-guilty verdicts. Under these circumstances, it is completely impossible for us to say that the State has demonstrated, beyond a reasonable doubt, that the prosecutor's comments and the trial judge's instruction did not contribute to petitioners' convictions." (*Chapman* v. *California, supra* at 25-26)

More recently this Court reversed a conviction for violation of the *Griffin* rule, stating that:

> "While the evidence against petitioner was sufficient to convict, * * * we cannot say that the prosecutor's

> extensive argument asking the jury to overlook inferences favorable to petitioner because he invoked his constitutional right not to testify was, in the words of *Chapman,* 'harmless beyond a reasonable doubt.'" (*Anderson* v. *Nelson, supra* at 525)

On this basis alone, the decision of the Court of Appeals should be reversed.

To attach significance to the failure of trial counsel to object in the circumstances of this case is flatly inconsistent with the Court's decision in *O'Connor* v. *Ohio, supra.* There the Court held that where the constitutional protection was unknown at the time of trial "the failure to object in the state courts cannot bar the petitioner from asserting this federal right." 385 U.S. at 93. Again, for this reason alone, the decision of the Court of Appeals should be reversed by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the writ of certiorari should issue.

Dated: New York, New York
April 24, 1969

Respectfully submitted,

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APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 67—September Term, 1968.

(Argued September 17, 1968 Decided January 24, 1969.)

Docket No. 32170

UNITED STATES *ex rel.* DOSSIE WALLS,

Relator-Appellant,

—v.—

VINCENT R. MANCUSI, Warden,
Attica State Prison,

Respondent-Appellee.

Before:

LUMBARD, *Chief Judge,*
WATERMAN and HAYS, *Circuit Judges.*

Appellant, serving a New York State sentence of imprisonment, applied, claiming violation of federally guaranteed constitutional rights at his state court trial, to the United States District Court for the Western District of New York for release upon habeas corpus. Application denied, Henderson, *J.* Order affirmed.

WILLIAM T. LIFLAND, New York City, *for relator-appellant.*

JOEL LEWITTES, Asst. Attorney General; Louis J. Lefkowitz, Attorney General of New York, *for respondent-appellee.*

WATERMAN, *Circuit Judge*:

On March 16, 1961, after a jury trial, relator and his co-defendant Woodrow Greene were convicted in the Kings County Court, New York, of robbery in the first degree, assault in the second degree, and grand larceny in the second degree. Subsequently, on April 27, 1961, the state trial judge adjudged relator to be a second felony offender and sentenced him to a term of fifteen to thirty years imprisonment. An appeal was taken by relator and his codefendant to the Appellate Division of the New York Supreme Court, Second Department, where the convictions were unanimously affirmed without opinion. *People* v. *Greene and Walls*, 24 App. Div. 2d 934, 264 N. Y. S. 2d 1017 (2d Dept. 1965).

Thereafter, having exhausted his available remedies in the state courts, 28 U. S. C. §2254, relator applied to the United States District Court for the Western District of New York, Henderson, *J.*, for a writ of habeas corpus to procure his release from Attica State Prison. 28 U. S. C. §2241. He claimed in his application that his federally protected constitutional rights had been violated during his state court trial in that (a) four single one dollar bills and a small roll of bills totaling $100 which were seized in the course of an illegal search of his person were introduced into evidence against him; (b) inasmuch as he exercised his right not to take the stand in his own defense, that right was prejudicially violated when the trial judge stated in open court in the presence of the jury that "Perhaps the defendant will explain" how the seized evidence came to be

in his possession; (c) he was denied due process when the trial judge examined a pre-trial statement of the complaining witness and stated there was no inconsistency between that statement and the witness's trial testimony when the statement in fact contained some inconsistencies. After examining these claims the district court entered orders that it had jurisdiction and would entertain the application, and that the relator need not be produced in court in person but that the full state records before the trial and appellate courts and the pre-trial statement of the complaining witness should be produced. Thereafter, a memorandum opinion was filed and an order entered denying the application. However, a certificate of probable cause for appeal was granted, and on the motion of the relator we have permitted him to proceed *in forma pauperis* and have assigned him counsel on appeal.

In addition to the claims presented to the district court which we have already mentioned, the relator asserts one new claim in this court. He now claims that the district court's failure to appoint counsel to represent him below in the habeas corpus proceeding was prejudicially improper.

We affirm the denial of the relator's application by the district court.

As to relator's first claim we hold that the search and seizure which occurred in this case was properly incident to a lawful arrest.

The law has long been that officers have the right to search without a search warrant the person of one lawfully arrested and evidence so obtained is admissible against him at his trial. E.g., *Agnello* v. *United States*, 269 U. S. 20 (1925). The justification for allowing this type of search has been the necessity to thwart destruction of evidence,

to uncover and seize weapons or other instruments or tools which might be used to assault the arresting officer or to effect an escape, and to uncover devices designed to destroy evidence of the crime. *Preston* v. *United States,* 376 U. S. 364, 367 (1964). Such a search is not proscribed when the officer has probable cause to arrest the person, the search is substantially contemporaneous with the arrest, the search is confined to the immediate vicinity of the arrest, and the search is reasonably limited in scope to the purposes for which it is allowed. E.g., *Sibron* v. *New York* (*Peters* v. *New York*), 392 U. S. 40, 66-67, 88 S. Ct. 1889, 1904-1905 (1968); *James* v. *Louisiana,* 382 U. S. 36, 37 (1965); *Preston* v. *United States, supra* at 367-368; *Stoner* v. *United States,* 376 U. S. 482, 486-488 (1964). See, generally, J. Israel, *Recent Developments in the Law of Search and Seizure,* in Criminal Law and the Constitution 101, 163-179 (Institute of Continuing Legal Ed. 1968).

Here Officer Johnson had "probable cause" to arrest relator and his codefendant. See *Brinegar* v. *United States,* 338 U. S. 160, 174-177 (1949). The record is clear that on August 12, 1960, Ralph LaFord, a truck driver, while seated in his van truck, was robbed at knifepoint by two men. The robbery occurred near the corner of Decatur Street and Lewis Avenue in Brooklyn, N. Y., at approximately 10:30 a. m. Immediately after being robbed LaFord drove his van down the block toward Decatur Street where he spotted a police car and Patrolman Cannon. LaFord informed the officer that he had been held up and gave a description of the hold-up men. Cannon summoned his partner, Patrolman Easely, put LaFord in the patrol car, and pursued the two men who were still in sight running up Lewis Avenue. The pursued two men made a left-hand turn onto McDonough Street, and when Cannon arrived

at McDonough Street he saw another police car parked about fifty feet from the corner on that street.

Patrolman Johnson, who was on other police business, was parked in this second car. Patrolman Cannon spoke to Johnson briefly, and undoubtedly Johnson was informed of the occurrence of the robbery. Johnson, prior to the meeting with Cannon, had observed two men whom he later identified as relator and his codefendant running down McDonough Street. The two men then turned into a school yard.

Following the brief conversation between the officers, Cannon, his partner, and LaFord ran the length of the school yard after the two fleeing men while Patrolman Johnson drove his car around the block. Near the corner of Decatur Johnson saw relator crouching behind the seat of a parked panel truck, the door of which was open. Believing this man to be one of the two men he had observed running along the nearby street, Officer Johnson ordered him out of the truck at gunpoint. At approximately the same time relator's codefendant stepped out of an adjacent doorway and was also detained by Officer Johnson. Both men were held at bay and searched and the $104 mentioned above was found on relator. As the search was being completed, Officers Cannon and Easely, and LaFord arrived on the scene. LaFord then identified the two men as the ones who had robbed him and taken his money a few moments earlier.

Officer Johnson had, at the time relator and his codefendant were detained, sufficient probable cause to believe that a felony had been committed and that the relator and his codefendant were the two men who had committed it. Compare, e.g., *Trimble* v. *United States,* 369 F. 2d 950 (D. C. Cir. 1966); *United States* v. *Vida,* 370 F. 2d 759,

cert. denied, 387 U. S. 910 (1967); *United States ex rel. Mason* v. *Murphy*, 351 F. 2d 610 (2 Cir. 1965). Relator, however, argues that even though probable cause to arrest may have existed, no arrest in fact was made until after he had been searched and after LaFord had identified him and his codefendant as the two men who had taken his money. Consequently, relator asserts that this search was not a search incident to a lawful arrest because it preceded the arrest and formed part of the justification for the arrest. We do not agree. The lack of formal announcement of arrest presents no constitutional infirmity under these circumstances where Officer Johnson, who was in "hot pursuit" of the two men who had just committed a felony, apprehended relator and his codefendant. See *Warden, Md. Penitentiary* v. *Hayden*, 387 U. S. 294, 310-313 (Fortas, *J.*, concurring) (1967); compare *Sibron* v. *New York, supra.* In the instant case the arrest, for purposes of constitutional justification, occurred at the moment Officer Johnson ordered relator out of the truck at gunpoint. *Sibron* v. *New York, supra;* see *Bailey* v. *United States*, 389 F. 2d 305, 307-309 (D. C. Cir. 1967); cf. *Buick* v. *United States*, 396 F. 2d 912, 915 (9 Cir. 1968).

Having validly arrested relator, Officer Johnson was entitled to make the limited, contemporaneous search for weapons and fruits of the crime that he made. *Sibron* v. *New York, supra; Preston* v. *United States, supra; Agnello* v. *United States, supra* at 30. Therefore, the one hundred dollars in a small roll and the four one dollar bills taken from relator's pockets by Officer Johnson were admissible at trial since they were obtained in the course of a constitutionally valid search of relator's person.

When the prosecution sought to introduce into evidence the money Officer Johnson found in relator's possession,

the following colloquy took place between the court and defense counsel:

> The Court: . . . This witness says that this is the money he took out of the pocket of the defendant. He does not say that this is the money that the complainant said was in his wallet. This witness' testimony strictly is that it was taken from the pocket of the defendant Walls, the rear pocket of the defendant Walls. He took this money which he now has in court and which consists of a twenty dollar bill, six tens and four fives. That is all he said.
>
> Mr. Blum: That is why I objected to the introduction of it into evidence, because there is evidence of this particular four dollars by this complainant.
>
> The Court: I know that money has no earmarks.
>
> Mr. Blum: That's correct.
>
> The Court: However, I am allowing this money in evidence at this time as money found on the person of the defendant. *Maybe the defendant will explain.* (Emphasis supplied.)

The relator contends that the last remark made by the trial judge violated relator's constitutional rights under *Griffin* v. *California,* 380 U. S. 609 (1965). According to the relator, the practical effect of the remark was to place the burden of proving how he came by the seized money found on him, and to force him either to volunteer an explanation, thereby forcing him to abandon his right to remain silent, or to suffer a substantially increased risk of an adverse verdict.

Although we would strongly disapprove of the state trial judge's unfortunate off-hand statement, we are not convinced that the remark requires the reversal of the district

court. No objection or exception was taken to the statement when said, and, considering the time and context of the comment, the fact that codefendant Greene did take the stand and gave an explanation of how relator happened to have the money (an explanation the jury apparently disbelieved), the other evidence presented at the trial, and the trial judge's charge to the jury which instructed them that the relator was not required to take the stand and which satisfactorily advised the jury that the burden of proof never shifted from prosecution to the relator, it is highly unlikely that any substantial rights of relator were affected by the judge's remark. Consequently we hold that the comment was not prejudicial to the substantial rights of relator. See *Chapman* v. *California*, 386 U. S. 18 (1967); Fed. R. Crim. Proc. 52; cf. *Locklear* v. *United States*, 393 F. 2d 729 (5 Cir. 1968); *Ramer* v. *United States*, 390 F. 2d 564, 577 (9 Cir. 1968); *United States ex rel. D'Ambrosio* v. *Fay*, 349 F. 2d 957, 958-961 (2 Cir.), *cert. denied*, 382 U. S. 921 (1965).

Relator contends in this court that he was improperly denied the benefit of counsel by the district court because no counsel was assigned to represent him there in the habeas corpus proceeding. This claim is without merit. After examining the record as made, we cannot say that the procedure employed by the district court resulted in less than a fair, adequate, and meaningful consideration of relator's claims. See *United States ex rel. Wissenfeld* v. *Wilkins*, 281 F. 2d 707, 714-716 (2 Cir. 1960); *United States ex rel. Marshall* v. *Wilkins*, 338 F. 2d 404 (2 Cir. 1964).

The other contentions advanced by relator do not merit discussion.

Judgment affirmed.

Appendix B

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

CIVIL 1966-39

UNITED STATES OF AMERICA *ex rel.* DOSSIE WALLS,

Relator,

—vs.—

VINCENT R. MANCUSI, Warden, Attica State Prison,

Respondent.

Relator pro se.

Louis J. Lefkowitz, Esq.,
Attorney General of the State of New York
(Joseph J. Ricotta, Esq., Assistant Attorney General, of Counsel), for the Respondent.

Following a jury trial before the Kings County Court, in which he was found guilty of robbery in the first degree, assault in the second degree and grand larceny in the second degree, the relator, on April 27, 1961, was adjudged a second felony offender and sentenced to from fifteen to thirty years' imprisonment. He has submitted an application for a writ of habeas corpus claiming he is presently in custody in violation of his constitutional rights. Relator has exhausted his available state remedies as required by Title 28 U.S.C. § 2254.

By order dated July 29, 1966, the court directed the respondent to show cause why a writ should not issue.

In response to that order, the Assistant Attorney General produced the transcript of relator's trial and briefs filed with the Appellate Division of the Supreme Court, Second Department. Since certain statements had been omitted from the record, those statements subsequently were requested by the court and were supplied on November 9, 1966.

Initially, the relator claims that certain evidence was taken from his person in the course of an illegal search and seizure.

The charges against the relator and a co-defendant, Woodrow Green, arose from the taking of monies by force from a truck driver in Brooklyn, New York. Almost immediately after the robbery, and after the assailants had fled on foot, the truck driver reached a police car and advised two officers in the car of the crime. The truck driver entered the police car which set out in pursuit of the assailants.

A short distance away, as he was approaching his patrol car, a third police officer observed the relator and Green running down the street and into an adjacent schoolyard. As they ran through the schoolyard the two patrolmen and the truck driver pulled up, and a brief conversation took place. The two patrolmen and the truck driver then set out on foot through the schoolyard. In the meantime the third patrolman drove around the block and quickly apprehended both Walls and Green. Walls was hiding in a parked truck and denied that he was one of the men whom the officer had seen running through the schoolyard. Green was halted as he emerged from a nearby store.

While the third officer was holding Green and Walls at bay, he was joined by the others. Walls was then searched and the stolen money recovered. On this record the court

concludes that probable cause existed for the arrest of the relator, and that the search of relator was a proper incident of that arrest.

Having reviewed the claims which relate to the nonproduction of a pretrial statement, proof of prior identification, and alleged improper conduct by the trial judge, the court finds them to fall short in establishing any violation of relator's constitutional rights.

With respect to the trial judge's comment "Perhaps the defendant will explain" as to money found on his person, it appears that the remark was directed to a possible explanation of property which the jury might find had been recently stolen, and was not intended as any indication of an obligation on the part of the relator to take the stand and testify in his own behalf. The time and the context of the remark obviously preclude its being characterized as a comment on the accused's failure to take the stand. On the other hand, if the remark could be taken as some indication of an obligation on the part of the relator to testify, it apparently escaped counsel inasmuch as no objection was made. While this undoubtedly is a close question,[1] the court notes that the relator's codefendant elected to take the stand and to offer an explanation of relator's possession of the money in question and, further, that the state courts, which have been diligent in the protection of accused persons from improper remarks,[2] have weighed and rejected this claim. Finally, it should be noted that the trial court in its charge instructed the jury that the relator was not required to take the stand

[1] See Griffin v. California, 380 U.S. 609 (1965); United States ex rel. D'Ambrosio v. Fay, —— F.2d —— (2d Cir. Aug. 17, 1965).

[2] People v. McLucas, 15 N.Y.2d 167, 256 N.Y. Supp. 2d 799 (1965).

and repeatedly advised them that the burden of proof never switched from the prosecutor to the defendants (t. 250, 257, 269-270, 275).

Having reviewed the entire record, the court is not convinced that the brief remark of the trial judge is sufficient to constitute a violation of the relator's constitutional rights.

The application is denied. Certificate of probable cause for appeal is granted.

Permission to appeal in forma pauperis is denied, with the qualification that the relator may file with the Clerk of the United States District Court, United States Courthouse, Buffalo, New York, a notice of appeal without the payment of filing fees.

This denial does not prevent the relator from applying directly to the Court of Appeals for the Second Circuit, United States Courthouse, Foley Square, New York City, for permission to prosecute an appeal in forma pauperis.

So ordered.

JOHN O. HENDERSON
United States District Judge

DATED: Dec. 30th, 1966.